



The Strange Death of Academic Commercial Law

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In the 1960s, commercial law was a hot field. Bright young things flocked to commercial law; the best law journals regularly published commercial law articles; the field, recently upended by the then-current enactment of the Uniform Commercial Code, seemed a Golconda for the eager scholar. Now, though, what do we see? An aging and shrinking professoriate, particularly at the better schools; fewer and fewer offerings, and those not infrequently taught by adjuncts—again, mainly at the better schools; less and less scholarship, especially in the top journals. In short, a dying field, and one with few signs of revival.

In this Essay, I first see whether these signs of decline, generally acknowledged by academic commercial lawyers, are in fact present. By looking over the last several decades at teaching demographics and publication records, we see that they are, particularly at the schools that produce most law professors. The causes are many: a hiring boom in the 1960s, followed by a hiring bust of a few decades; the emergence of other, more apparently glamorous fields as contenders for the attentions of ambitious academic fledglings; the relaxed attention given curriculum generally by the leading law schools; the often unimaginative teaching materials that make the field seem intellectually uninteresting. The consequences of these many causes are dire. If leading schools do little to produce commercial law scholars, and if their journals publish little if anything in the area, then it is hard to see how this decline might cease. This should concern us all, not merely within the shrinking commercial professoriate; if the field lacks intellectual vitality, then we are likely to see unimaginative and sterile law, whether through law reform or through judicial development.

The Essay concludes with some suggested means to reverse this trend. Most, to be sure, require a degree of individual or institutional inconvenience uncommon in the academy, and others require that concerns of ranking be somewhat subordinate—again, not a usual vantage, particularly now. But rescuing academic commercial law is important enough that some temporary inconvenience is a modest enough cost—at least, if we are willing to bear our share of responsibility for the well-being of the law.

Near the start of his literary career, George Dangerfield wrote *The*

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Strange Death of Liberal England.¹ Dangerfield took on one of the great questions of twentieth-century British history: How could the Liberal party go from a landslide victory in the 1906 election to division and disaster only a decade later, taking with it the liberal philosophy that had figured so greatly in British history for a century or more? His answer, phrased in lambent, witty, irresistible prose, is a landmark of British historiography.

I do not wish to raise the reader's hopes overmuch. Anyone seeking lambent, witty, irresistible prose had better look elsewhere. But the topic is similar, if perhaps less globally cataclysmic. Only forty years ago, commercial law was as hot a topic as the legal academy possessed. Bright young things flocked to commercial law; the best law journals regularly published commercial law articles; the field, recently upended by the then-current enactment of the Uniform Commercial Code (UCC), seemed a Golconda for the eager scholar. The sky was the limit. But the sky was the limit for Icarus, too.

Now what have we? A dead field, as the title somewhat melodramatically suggests? No—but then the Liberal party staggered on for decades in some form or other, and even now, under an alias, yaps eagerly at the heels of Labour and Conservative alike. So too academic commercial law, though the image might better be an aging and phlegmatic basset hound than a feisty if overmatched terrier. Our numbers shrink, particularly at the better schools; we are seen little in print, and almost never in the top journals; we collectively age, and the current wave of retirements is nowhere near matched by an influx of the young and vital. Dead? No. Dying? Well . . .

In this Essay I do not pretend to compass the reasons for academic commercial law's decline. I propose, however, to show the size of the problem, sketch some of its causes, and lay out some possible solutions. And solutions we require: For academic commercial law to lapse into innocuous desuetude would be, in its way, a calamity. Certainly a calamity for those of us in the academy who stubbornly study it, for there is little pleasure in shouting into a void. But a calamity as well for those whom commercial law affects—that is, all of us: judges who rule on commercial disputes, lawyers who advise clients on how they should behave or how a failed deal leaves them, and the rest of us, save a few reclusive or quixotic noncombatants in the battles of the marketplace.

I. INTIMATIONS OF MORTALITY

This Essay has its roots not in musings on Dangerfield's masterpiece, but

¹ GEORGE DANGERFIELD, *THE STRANGE DEATH OF LIBERAL ENGLAND* (1935). Altogether too near, at least for this author; in 1935 Dangerfield was thirty-one, an age at which I had . . . oh, never mind. It's too depressing.

in stray reflections on life as an academic commercial lawyer. First, it is hard to hire in commercial law. Many schools try to hire in it,² but there are very few plausible candidates, and, the relations of supply and demand being what they are, they tend to be highly-priced commodities. Some schools, indeed, seem to have given up. Second, the limited supply, coupled with plenty of retirements, means that there are fewer and fewer commercial law professors at the usual meetings, and those few are older and older. Third, it is a little too easy to keep up with the literature. Many issues of the *Current Index of Legal Periodicals* have nothing in commercial law, or nothing other than perhaps a student note or a survey of state law. (Try getting away with fewer than ten articles in constitutional law in any issue of CILP.) And one need not bother having the top reviews sent to one's office, at least not for professional reading, as they hardly ever publish in commercial law.

These casual observations are commonly voiced when commercial law professors gather.³ But my task is not to retail the idle thoughts of a chatty academic, but rather to see whether these idle thoughts have any basis. I'll start by showing the scope of the problem, looking first at the demographics of commercial law faculty and then considering the effects on commercial law scholarship. From there we turn to the likely causes for the sharp decline in academic commercial law. These are many. Some qualify as bad timing, particularly the boom in commercial law just at the start of a period of rapid faculty growth. Some are the regrettable consequences of perfectly innocuous policies, particularly hiring without regard to scholarly or curricular area. Others are at least negligent, particularly a certain disregard, if not disdain, for the academic pursuit of commercial law.

At this point, readers may wonder why anyone should care. Scholarly interests rise and fall, and perhaps commercial law's glorious years are ending. Why, then, should we care if academic commercial law falls into oblivion? This Essay therefore spends a page or two considering why it is important to us all—as academics, as lawyers, and as citizens—that commercial law remain a lively part of the academy.

Finally, this Essay is not an obituary, though it may become one if law schools do nothing.⁴ It is a little out of keeping with the amiably malicious

² In a placement bulletin issued by the Association of American Law Schools in October 2006, commercial law was second only to corporate law in the number of mentions as a specific need.

³ Not that there are enough of us to gather very well. Perhaps huddle would be a better word. Some would say skulk.

⁴ Over a decade ago, another symposium article—an excellent article, filled with shrewd observations and sound proposals—similarly lamented the declining condition of commercial law and proposed solutions. Kerry L. Macintosh, *We Have Met the Enemy and He Is Us*, 26 LOY. L.A. L. REV. 673 (1993). The legal academy promptly responded by continuing to allow commercial law to decline. (Indeed, the article was part of a

tone of this symposium to offer a solution, but I feel obliged to do so all the same. Just as the causes of this mounting crisis are complex, so too are the solutions—at least, if one takes any account of realism. Hence this Essay's close.

A. *And Then There Were . . .*

Let us start, then, with the basic demographic point. Are we commercial law professors in the midst of an academic plague, or perhaps in a sort of scholarly Stepford in which shiny young public lawyers mysteriously appear in our places? To test this, I looked at the number of commercial law professors at AALS-member law schools over forty years, starting with 1965–1966 and ending with 2005–2006.⁵ For the sake of comparison, I looked at two other fields, one fairly stable, one booming. Criminal law and procedure seemed a decent example of a stable field; certainly these have been hot topics of late, but that was true as well during the late Warren Court, and for some time—really, some millennia—before.⁶ Intellectual property

symposium entitled “Is the UCC Dead, Or Alive and Well?”—a question that may have been imprudent to raise in the presence of other legal academics.) Perhaps this call for reform will prove more effective. Or, of course, it could have much the effect of those millenarians who periodically announce the imminent end of the world.

⁵ For the sake of methodological tidiness: Using the annual *AALS Directory of Law Teachers*, my research assistant counted professors listed as teaching each subject that academic year, thus eliminating those no longer in the area. Inevitably this also omits faculty on leave or who are temporarily away, but that should not affect the relative values. She also eliminated duplication when an area is split among more than one heading. For example, commercial law is now split between Commercial Law (including sales and secured transactions) and Payment Systems.

These data are not perfect. In particular, faculty may not always conscientiously update their entries, thus creating the misleading impression that they still teach in fields that they have long since abandoned (and thus that they do not teach in areas that they have long since embraced). It would be possible to determine whether a professor is teaching a subject in the current year by canvassing law school web sites, and, if necessary, checking with the registrars where the web sites are unhelpful. This method would not, however, work for teaching areas over time. Short of checking with individual faculty, an impossibly time-consuming task, it is hard to see where other than the faculty directory to look. One should thus draw conclusions from these data with some caution, though spot checks of people with whom I am familiar suggest that most people keep their entries reasonably up to date.

⁶ This may not be a perfect comparison, because criminal law is a required course and commercial law generally is not. As a result, the number of criminal law professors will more closely track the size of law schools than will the number of commercial law professors. Still, criminal procedure has a place in the curriculum similar to commercial law, and a not trivial number of schools require commercial law, so the comparison is not entirely inapt.

was my choice of booming topic, for reasons so obvious that even the most compulsive law journal editor could not demand a footnote.⁷ For easier comparison, the table below contains both the gross numbers and a normalized figure, setting 1965–1966 equal to 100. Here, then, are the results:

Field	1965 to 1966	1975 to 1976	1985 to 1986	1995 to 1996	2005 to 2006
Commercial Law	241	453	392	434	427
Normalized	100	188	163	180	177
Criminal Law	227	703	691	800	957
Normalized	100	310	304	352	422
Intellectual Property	46	137	113	197	343
Normalized	100	298	246	428	746

We can look at the information in another way, using the number of commercial law professors as the denominator and the number of professors in the other fields as the numerators. This more directly shows how those fields have changed when compared with commercial law. The totals:

Field	1965 to 1966	1975 to 1976	1985 to 1986	1995 to 1996	2005 to 2006
Commercial Law	100	100	100	100	100
Criminal Law	94	155	176	184	224
Intellectual Property	19	30	28	45	80

Grim, isn't it? It's hard to imagine an age in which there were more commercial law professors than criminal law professors, but that was the case in 1965–1966. Intellectual property was then something like admiralty or equity—an area worth teaching from time to time, but hardly essential. Even a decade later, the signs of stagnation were present. The growth in both number and size of approved law schools buoyed up all the figures, but commercial law lagged noticeably. Since then? We've added a couple of hundred criminal law professors, and a couple of hundred intellectual property professors as well (though on a much smaller base). But, despite the continued expansion of law faculties and the continued increase in the

⁷ Not even this one.

number of law schools, we have fewer commercial law professors in 2005–2006 than we did in 1975–1976. One can certainly understand a lack of relative growth. Many fields have sprouted over the last generation or two, requiring new courses and new faculty to teach them. Others have expanded greatly. Still, thirty years of stagnation—or worse, allowing for the increase in the number of law schools—is more than a little disquieting.⁸

It gets worse. Another casual observation was the aging of the commercial law professoriate. Commercial law was hot when the UCC was fresh, but since then corporate law and bankruptcy have elbowed it aside within business law, and myriad public-law fields now compete for attention as well. Luckily, the AALS keeps track of the years faculty have taught subjects, so we can look more closely at professorial demographics. The directory lists teachers under one of three bins: one to five years, six to ten years, and over ten years. Here are the numbers, laid out by percentage:

Percentages	1965 to 1966	1975 to 1976	1985 to 1986	1995 to 1996	2005 to 2006
Commercial, 1–5	52.3%	63.1%	40.8%	33.2%	29.3%
Commercial, 6–10	12.0%	19.6%	26.3%	16.8%	16.9%
Commercial, 11+	35.7%	17.2%	32.9%	50.0%	53.9%
Criminal, 1–5	57.7%	74.4%	50.9%	42.8%	41.3%
Criminal, 6–10	17.2%	14.4%	20.1%	17.6%	17.6%
Criminal, 11+	25.1%	11.2%	28.9%	39.6%	41.1%
IP, 1–5	47.8%	62.0%	54.9%	50.2%	49.9%
IP, 6–10	30.4%	20.4%	21.2%	19.8%	20.1%
IP, 11+	21.7%	17.5%	23.9%	29.9%	30.0%

A look across the columns is instructive, not to say depressing. In 1965–1966, the commercial law professoriate had proportionately more junior members than that for intellectual property, a lead it retained a decade later.

⁸ The American Bar Association collects data on faculty size, published for some decades in its *Annual Review of Legal Education* and now in binders provided to law deans. Here are the numbers of full-time faculty for the pertinent periods:

1965–1966 2222
 1975–1976 3702
 1985–1986 4881
 1995–1996 5675
 2005–2006 7172

These are gross numbers, and do not allow for the rise of skills teaching in the latter half of this period. But they do suggest that, while intellectual property is, in relative terms, a growing part of law school faculties, and criminal law and procedure is a fairly stable part, commercial law is shrinking—again in relative terms, by some fifty percent over the last three decades.

After that, though, the percentage of junior faculty dropped steadily. To be sure, it dropped as well in the other fields; the boom of the 1970s skews these figures. But commercial law has aged more than the other fields, with eager-beaver juniors occupying a smaller and smaller part of the cohort. Put differently: The median intellectual property professor is almost in the one to five year bin. The median criminal law professor is in the six to ten year bin. The median commercial law professor is in the eleven and up bin.

Why does this matter? A few reasons, none of them joy-inducing. Young scholars tend to be more productive than their seniors, partly because of energy, partly because of higher expectations at many schools, partly because of different responsibilities.⁹ An aging field will tend to produce less scholarship and thus figure less in the minds of prospective law teachers. Even more than that, new approaches to legal scholarship are more likely to be pushed ahead by those new to the field than by those who have already developed their scholarly methods. A sign of this is the current tendency among the better law schools, and those with ambitions above their station, to hire the holders of Ph.D.'s who can do rigorous interdisciplinary work. Without this influx, a field runs the risk of stagnation, again becoming less attractive to promising junior scholars.

Obviously these numbers are not perfect. Most critically, they count teachers rather than scholars. Someone who teaches criminal law as a service class counts the same as Yale Kamisar; someone who longs to get out of payment systems, but teaches it by decanal dictate, counts the same as Jim White. Perhaps one could devise a winnowing method that combines scholarly focus with the percentage of teaching in commercial law. Were this a piece of serious social science, rather than merely a first approximation, one would. However crude these numbers, though, we can see that commercial law teachers occupy proportionately less space on faculties than they did, and the population seems to be aging substantially.

B. Rotting at the Top

Another imperfection in these data does need closer attention, though, because it goes to important questions about the current and future intellectual vitality of academic commercial law. Looking at the total

⁹ This needs a caveat. The most senior AALS bin—eleven years and up—includes both mid-career scholars, who may well be near their peak productivity, and senior scholars, who are more likely to have passed it. Ideally one would be able to divide this further. Still, given the longitudinal patterns, it is not unreasonable to conclude that for commercial law, the huge hiring classes of the 1960s and relatively modest ones since have yielded a distribution tilted more toward the senior end of the most senior bin than for criminal law, with a more even hiring distribution, or intellectual property, with a fairly recent hiring boom.

population of commercial law professors means that we make no distinction among professors and schools. In commercial law, as in other fields, superb scholars may be found at schools not generally known for scholarship. Similarly, excellent articles may come out in journals not normally placed in the top tier.¹⁰ This granted, there is much to be said for a look at the elite schools and the elite journals. A large percentage of law teachers, particularly teachers at the top schools, come from a handful of law schools.¹¹ Faculty at those schools dominate lists of the most cited-to academics.¹² The most cited-to articles in legal scholarship were published in a handful of journals.¹³ Publishing in elite journals is a path upwards for the underplaced and ambitious academic. And, of course, those of us not banqueting with the elite usually have our noses pressed against the glass. If a scholarly approach takes hold at the best schools, aspirants take heed and follow, as, at a slight remove, will aspirants to the level of those aspirants, and so forth. If a discipline falls from favor at the best schools, then one will shortly hear murmurs at schools below the salt that perhaps the time has come to rethink faculty resources. Time, then, to train our telescopes upward. Who teaches commercial law at the academic feeder schools? Do their flagship journals publish commercial law scholarship?

The reader may already have guessed that these questions will get distressing answers. The author thought as much, too, but didn't expect the answers to be quite as distressing as they were. Let us start with commercial law teaching at top schools. Professor Leiter has conducted two surveys of the academic roots of law teachers at the better schools, and Professor Solum

¹⁰ Not that commercial law scholars have much chance of breaking into these journals. See *infra* Part II.

¹¹ The most recent surveys are available online. Brian Leiter, *The Best Law Schools for the "Best" Jobs in Law Teaching*, May 25, 2006, http://www.leiterrankings.com/jobs/2006job_teaching.shtml.; Lawrence B. Solum, *Law School Entry Level Hiring Report (2005–06 Hiring Season): Version 4.18*, May 17, 2006, http://lsolum.blogspot.com/archives/2006_05_01_lsolum_archive.html (scroll down to the May 17, 2006 entry).

¹² Again, the newest study is available online, though the pattern has been stable over time. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 420 (2000); Brian Leiter, *Top 119 Cited Faculty, 2002–03*, 2002, http://www.leiterrankings.com/faculty/2002faculty_impact_cites.shtml (last visited Jan. 20, 2007).

¹³ Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1549 (1985); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 763 (1996). Relatedly, total citations to law reviews drop quite precipitously when one leaves the top couple of dozen. See, e.g., Fred R. Shapiro, *The Most-Cited Law Reviews*, 29 J. LEGAL STUD. 389, 392 (2000); Washington & Lee Law School, Law Journals: Submissions and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Jan. 20, 2007).

has looked more broadly at recent placements.¹⁴ Fifteen schools appear high on all three lists, though nine schools stand somewhat apart from the others.¹⁵ In the more recent Leiter survey, these fifteen granted J.D.'s to the overwhelming majority of tenure-earning professors in the better law schools. His earlier survey cast a wider net, as did the Solum study, and showed that these schools also supplied the overwhelming majority of tenure-earning professors in all schools. So, then, what do they teach, and whom do they have teaching it?

Like Caesar's Gaul, commercial law may be divided into three parts—Sales, Secured Transactions, and Payments/Negotiable Instruments/Commercial Paper/Bills and Notes. Electronic Commerce is a more and more common fourth class, and sometimes there are advanced courses. In 2005–2006, here is what these schools taught:

Secured Transactions	13 (87%)
Payments	7 (47%)
Sales	7 (47%)
E-Commerce	3 (20%)
Advanced	3 (20%)

A very mixed bag. Secured Transactions fares well, but no other course was taught at most of these schools. Another way of looking at it is to see how many of the three main UCC classes were taught at each school:

Three	3
Two	6
One	6
Zero	0 ¹⁶

The top nine schools show similar patterns. They offered the following courses in 2005–2006:

Secured Transactions	7 (78%)
Payments	3 (33%)
Sales	4 (44%)
E-Commerce	2 (22%)
Advanced	1 (11%)

¹⁴ See sources cited, *supra* note 11; Brian Leiter, *Where Tenure Track Faculty Went to Law School*, 2000–02, http://www.leiterrankings.com/faculty/2000faculty_education.shtml (last visited Jan. 20, 2007).

¹⁵ *Id.* Alphabetically, but italicizing those at the top of the list: *Boalt*, *Chicago*, *Columbia*, *Cornell*, *Duke*, *Georgetown*, *Harvard*, *Michigan*, *NYU*, *Northwestern*, *Penn*, *Stanford*, *Texas*, *Virginia*, and *Yale*.

¹⁶ Yes, even Yale taught one core commercial law class. *But see infra* note 18.

A little weaker than the larger group, but not extraordinarily so. This appears as well in the count of core offerings:

Three	1
Two	3
One	5
Zero	0

Sighs of relief? Maybe. At most of these schools (though only at a minority of the top nine), it was possible to take two or three UCC classes, and at some an advanced course as well. If we consider that some of these classes may be taught in alternate years, it may well be that students have a chance to take all three courses at some point in their law school lives.¹⁷

Before we think that all is well, though, we should look more closely still. Who teaches these courses at these fine schools? If they are taught by dynamic, productive faculty, then commercial law might seem more appealing to academic tyros. If it is taught by adjuncts or by—how to put it tactfully?—less dynamic faculty, then the tyros might turn their attentions elsewhere.

First we should look at adjuncts versus tenure-earning faculty. We usually think of adjuncts as appropriate for highly specialized courses with relatively modest appeal or academic interest, so this is not a bad index of academic regard. A grid may be useful here, showing both the number of courses taught and the number taught by tenure-earning faculty, again at the fifteen schools.

¹⁷ To be sure, these offerings are modest when compared with those at schools with less box office appeal—the Kevin Bacons of the academy, rather than the Johnny Depps. Consider, for example, the schools ranked from fifty to sixty-four in the most recent *U.S. News* survey (Connecticut, Baylor, Case Western, Arizona State, Cardozo, Florida State, Cincinnati, Utah, Brooklyn, Temple, Chicago-Kent, Missouri-Columbia, Pittsburgh, Tennessee, and Villanova). Good schools, the lot of them, and some of them greatly underrated. What do they offer? Again, a little chart:

Secured Transactions	15 (100%)
Payments	14 (93%)
Sales	10 (67%)
E-Commerce	2 (13%)
Advanced	2 (13%)

Better, certainly, with the basic courses offered at most schools and two of the three offered at practically all. A table of core offerings brings this home:

Three	9
Two	6
One	0
Zero	0

Unlike the top schools, then, these very-good-but-not-quite-top-drawer schools generally teach all the commercial law courses every year—and when they do not, they offer two of the three. Considerably stronger.

Number of Courses Taught by Tenure-Earning Faculty

Total Offerings	0	1	2	3
1	2	4		
2	1	0	5	
3	0	1	0	2

Put otherwise, of the 27 sections of UCC courses offered by these schools, 20, or 24%, were taught by tenure-earning faculty, and 7, or 26%, were not. It would be interesting to compare these percentages with, say, corporations, tax, intellectual property, federal courts, or other basic courses. Casual observation suggests that these courses are seldom taught by adjuncts. Commercial law may thus be edging toward an academic netherworld, with adjuncts valued as much as regular faculty.¹⁸ As John Langbein observed a decade ago:

In fields of law that have an intensely practical component, the national law schools find it difficult to recruit permanent faculty who work at levels of theoretical ambition appropriate to the new norms. Thus, as the seasoned specialists of the passing generation retire in fields like taxation, securities, commercial law, banking, employment law, and so forth, they are often not replaced. Increasingly in such fields, the curriculum is taught by practicing lawyers—so-called adjunct professors.¹⁹

If anything, the trend has increased over time.

But which tenure-earning faculty teach these courses? Here we face a very delicate topic. I would not want to suggest that commercial law at academic incubators has been left entirely to unproductive drones. That would be patently false, with superb scholars like James J. White (Michigan), Richard Craswell (Stanford), Clayton Gillette (NYU), and Avery Katz (Columbia) among last year's crop of teachers.²⁰ And, of course, every field

¹⁸ The top 9 schools show a similar pattern, with 78% of the sections taught by tenure-earning faculty (including one visitor). In contrast, 85% of the core commercial law offerings at schools ranked 50–64 were taught by regular faculty. In other words, 15% were taught by adjuncts, as opposed to 26% at the top 15 schools. And in case you were worried about a spasm of doctrinal attention at Yale: both of Yale's commercial law offerings—secured transactions and a seminar—were taught by an adjunct.

¹⁹ John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in *WHAT ARE LAW SCHOOLS FOR?* 1, 6 (Peter Birks ed., 1996).

²⁰ If you didn't see your name, rest assured it was omitted only for reasons of space.

has its share of the unproductive and uninspiring. What I can say publicly, though, is that the aging of the commercial law professoriate seems particularly acute at the top schools. Consider the top nine schools. Look at all twenty-seven sections of UCC courses—or, rather, at the twenty taught by tenure-earning faculty. How many were taught by faculty in law teaching for a decade or less—the young, vibrant sorts particularly inspiring to prospective law teachers? Based on the overall demographic data, one might think about half, as forty-six percent of commercial law teachers fall into that bin. So, then, nine or ten? No. Five, surely? No. Three? Nope. The answer: One. And he (John Pottow of Michigan) has written only in bankruptcy so far. So really NONE of the commercial law offerings at the top schools were taught by the most junior commercial law scholars.

Now, I would be the last to say that only the junior can be vibrant and inspiring. After all, I've been teaching law for over a decade, and . . . well, that may not be a good example. But the larger point is important: The top schools have not been hiring commercial law teachers, at least not junior ones.²¹ As junior faculty ordinarily produce more scholarship than do senior faculty, this suggests that commercial law is less likely to be taught by highly productive scholars, particularly at the top schools. So not only are the courses not always taught, and not only are they not always taught by tenure-earning faculty, but they are seldom taught by up-and-coming faculty.

C. The Sounds of No Hands Clapping

Before we look at causes for this demographic disaster, we might first look at scholarship. This is relevant both for its effects on current academics and indirectly for its effects on the hiring market. Our success as academics is measured significantly by our publications, and where they place is a common proxy for their quality. A gaudy placement announces a new star in the scholarly firmament, and brings the author to the attention of alert hiring committees. Even for the contented, publications in good journals yield security and status at one's own school. And a well-placed article will simply be read more often and given greater weight than a similar article less fortunately published.²² Less directly, most candidates have law review

²¹ They do play musical chairs from time to time; in the last several years, a very partial list would include Robert Scott's move from Virginia to Columbia, Clayton Gillette's from Virginia to NYU, and Ronald Mann's from Michigan to Texas.

²² Jim Chen recently showed that the citations per article for U.S. law reviews follow an exponential distribution, which suggests that placements in high-impact journals figure significantly in citation frequency. Jim Chen, *Modeling Law Review Impact Factors as an Exponential Distribution* (May 30, 2006), available at <http://ssrn.com/abstract=905316>. There is a problem of cause and effect here, of course, which will be discussed below.

experience, and it's safe to say that experience on the flagship law review, though not a requirement for serious candidacy at top schools, is important. Moreover, experience on a flagship law review may shape one's view of scholarship. Articles editors in particular will see a range of work and perhaps find some topic more or less appealing. They will also see what sorts of articles are submitted to them, which again will suggest that some areas are more vital than others. Ambitious proto-academics will also have been told that placement in top law reviews is important if they wish either to start at fine schools or end at them. We should thus look at law review publications overall, but particularly at placement in the top law reviews.

More tables, as you may imagine. Let us start with total publications in U.S. law reviews over the last four decades.²³ Again we will use criminal law and intellectual property for comparison.

Field	1964 to 1967	1973 to 1976	1983 to 1986	1993 to 1996	2002 to 2005
Commercial Law	294	185	192	251	219
Criminal Law	497	780	604	903	1415
Intellectual Property	267	207	309	582	752

In a period marked by vastly more professors, vastly more law journals, and a vastly greater need to publish, what happened in commercial law? The number of articles *dropped*, never reaching its peak of forty years back. Normalizing these with 1964–1967 as 100, we get the following:

Field	1964 to 1967	1973 to 1976	1983 to 1986	1993 to 1996	2002 to 2005
Commercial Law	100	63	65	85	74
Criminal Law	100	159	122	182	285
Intellectual Property	100	78	116	218	282

²³ Another methodological note. My research assistant used the *Index of Legal Periodicals* to count publications. She eliminated student notes, news stories, articles of less than five pages, reviews of state law, and bar journal essays. She also eliminated articles purely on foreign or comparative law, in an attempt to remove as many articles written by non-U.S. scholars as possible. Finally, she went through the lists of articles to remove duplicates created by multiple listings. The index comes in three-year groups for much of this period, so we used the three-year period that most closely fit the general pattern. The exception was the most recent period, as the index was not yet complete for 2005–2006.

So from the halcyon days of the mid-sixties, our comparison fields have almost trebled their publications, while commercial law has dropped by more than a quarter. Quite an accomplishment in the face of powerful trends to the contrary in legal education.

Ah, but you object that 1964–1967 was an unusually busy time in commercial law, and unfairly tilts the numbers. A fair objection. Let us look again at the numbers, this time using 1973–1976 as the baseline of 100:

Field	1964 to 1967	1973 to 1976	1983 to 1986	1993 to 1996	2002 to 2005
Commercial Law	159	100	108	136	118
Criminal Law	64	100	77	116	181
Intellectual Property	129	100	149	281	363

Satisfied? Even with this base, commercial law has treaded water over the last thirty years, while criminal law and procedure has risen over eighty percent and intellectual property, today's darling, has much more than trebled. When one spreads the existing articles over more journals, one imagines that editors simply don't see all that many commercial law pieces in their inboxes, making it harder for them to attach any importance to accepting one.

There was another surprise in these aggregate numbers. I cannot speak for other fields, but the numbers seemed grossly high in commercial law. Two hundred nineteen articles in 2002 to 2005? I could not recall seeing seventy-three articles a year in my field. This list was, however, overinclusive on closer inspection, containing many nonacademic articles. For the sake of consistency across fields, it made sense to leave the gross numbers intact. I did, however, look myself at three months of the *Current Index to Legal Periodicals* to see whether somewhat finer numbers might be useful. Conveniently, this index has tidy categories that match our three main headings. Here, I was able to ensure that all the articles were written by law faculty. This index also looks at a more selective list of periodicals, screening out bar publications (except for the leading ABA specialty journals), foreign journals, and practitioner-oriented trade journals. Here, then, were the totals for March to May of 2006:

Commercial law	6
Criminal law and procedure	125
Intellectual property	44

This is more depressing by far, but also more intuitively correct for commercial law. Most weeks I look at the index with anticipation and set it

down with resignation. There are interesting articles in cognate fields, most notably contracts and bankruptcy, and in methodologically important areas such as law and economics, legal history, and jurisprudence—but generally there is nothing at all in commercial law, and what there is at times lacks interest (as with all fields, of course). Putting this snapshot—nothing more than that—together with the gross data suggests that a large percentage of articles in commercial law are not written by academics or are not in traditional academic journals. This may surprise no one. Commercial law is a large part of legal practice, so practicing lawyers with an analytical bent will often write about it. But it may not be healthy for the literature to have so modest a contribution from the professoriate.

The problem is still more acute when we look at the top journals. Publication in these is often the ticket to an exalted professorial position. We know from earlier studies that commercial law is poorly represented in those journals.²⁴ Perhaps another series of pictures is in order. I therefore picked a list of sixteen top law reviews, based on citation frequency and association with top law schools.²⁵ I then looked at our three areas—commercial law, criminal law and procedure, and intellectual property—from 1964–1965 to 2004–2005, counting articles (not student notes or comments) in each field.²⁶ Here are the totals:

Field	1964 to 1965	1974 to 1975	1984 to 1985	1994to 1995	2004 to 2005
Commercial Law	10	6	4	3	2
Criminal Law	20	22	21	16	29 ²⁷
Intellectual Property	0	4	0	1	13

Criminal law and procedure seems generally active. Intellectual property gyrates madly.²⁸ Commercial law—a stately decline. This is still clearer if

²⁴ William J. Turner, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189, 195–96 (2000) (showing precipitous decline in commercial law placements in top journals from the 1960s to 1990s).

²⁵ The list comprises the flagship law journals at Boalt, Chicago, Columbia, Cornell, Duke, Georgetown, Harvard, Michigan, Northwestern, N.Y.U., Pennsylvania, Stanford, Texas, UCLA, Virginia, and Yale.

²⁶ I used the later year for journals that publish by calendar year rather than academic year.

²⁷ This jump may be explained by a Columbia symposium with thirteen articles.

²⁸ This was a bit surprising. Some of the reason may be the efflorescence of specialty journals in the area.

one looks at the top journals within this group.²⁹ Here goes:

Field	1964 to 1965	1974 to 1975	1984 to 1985	1994 to 1995	2004 to 2005
Commercial Law	8	3	2	1	0
Criminal Law	13	15	14	14	25 ³⁰
Intellectual Property	0	2	0	1	5

Zero? ZERO? Oh, dear. Now, this is only one year, but that is a most depressing number all the same.³¹ Even the two from the broader list gives us little encouragement. The leading law schools are unlikely to look at lateral candidates who do not publish in the leading law reviews, and the leading law reviews are not publishing articles in commercial law. (For that matter, the one person who published articles in the larger list of leading journals—Ronald Mann at Texas—already has a swell job.)

If you want to put all these pieces together, try asking yourself a question that I have asked many commercial law scholars. Can you name ten people under the age of forty-five³² who have published three very good commercial

²⁹ The flagship journals at Boalt, Chicago, Columbia, Harvard, Michigan, N.Y.U., Penn, Stanford, Virginia, and Yale.

³⁰ Again including the Columbia symposium.

³¹ Cf. Sara K. Stadler, *The Bulls and Bears of Law Teaching*, 63 WASH. & LEE L. REV. 25, 71 (2006) (no commercial law articles in the *Harvard Law Review* since 1999). This is as good a place as any to discuss Professor Stadler's brilliantly written and provocative analysis of the market in law professors, in which she compared publications since 1946 in the *Harvard Law Review* and recent faculty hires in the top twenty-five law schools to determine which fields are bullish and which bearish. She concluded that commercial law was a "strong sell"—that is, that prospective law teachers would do well to avoid it. *Id.* With no publications in her chosen law review, and several hires, the field, she thought, was overtenanted. It is safe to say that I do not agree. In part my reasons are in the preceding text. Just a few comments in passing: (1) Harvard is not strong in commercial law, the shining example of Elizabeth Warren to the contrary, so one would expect a particularly weak showing in its flagship law review. (2) The assumption that student demand and law review writing bear a necessary relation seems overstated. Students take classes for many reasons, not all of them out of sheer love. Nor do they always practice where they choose to write, or, if editors, accept for publication. (3) Concentrating on one superb law review and even the top twenty-five schools may not produce a balanced view of the legal academy, for reasons too tedious to lay out in a footnote. On the whole, Professor Stadler's approach is admirable for charting rises and falls in academic fashion outside the traditional core classes, but perhaps is less suited to analyses within that core.

³² I used to say forty, but changed it after a somewhat recent birthday.

law articles in very good—say, top thirty or so—journals? Now, this would be a silly question in most fields. Constitutional law? Criminal law and procedure? Torts? Law and economics? Critical race theory? Corporate law? Piece of cake, the lot of them. But no one I have asked in commercial law has been able to come up with ten. Possibly a thorough survey of the literature would yield ten, especially if one took a generous view of the top journals. But recall that I have already used a broad definition. Someone who meets this standard would likely satisfy the tenure requirements at a top fifty school, but would not necessarily be thought one of that school's rising stars. We could narrow the question to publications in top twenty journals—thus, the sorts of scholars who would be plausible lateral candidates at leading law schools. Ten? Of course not. Five? No. I can think of two or three at most. Bleak.

II. CAUSES AND CONSEQUENCES

By now I hope the reader agrees that something is amiss. Before we can look at possible remedies, though, we must consider how commercial law in the academy reached this level of inanition, both in numbers (particularly at the top schools) and in publications (particularly in the top journals). The two entwine, but for the moment may profitably be separated.

As with most historical phenomena, we must look at many causes. One cause is quite innocent. Commercial law was white-hot in the 1960s. Almost all the enactments of the Uniform Commercial Code came in that decade.³³ In many areas the Code upended conventional approaches. In some it retained the usual approaches, but with interesting and important twists. Every Code section needed, and received, much scholarly scrutiny. Ambitious young academics with an interest in business law naturally headed toward commercial law, as it presented a huge orchard filled with ripe, low-hanging fruit. But the bright young things of the 1960s are now eligible to join AARP, and many have chosen emerititude. In the meantime, commercial law's baby boom generation has meant two things for hiring. First, the waning glamour of commercial law meant that fewer potential superstars not already attracted by the field's allure headed that way. Second, faculties that had loaded up on commercial law when the field was hot saw no need to hire more after the field cooled. As a result, this generation of commercial law scholars has to some degree limited hiring, at least until the last decade's retirements. Of course commercial law professors retire every year, but this rather large tranche of faculty has meant first a hiring famine, and now a hiring frenzy. The hiring famine has meant that the generation immediately

³³ WALTER P. ARMSTRONG, JR., *A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 77 (1991).

following the boom in the 1960s and early 1970s was small. This in turn means that we have a dearth of faculty in their peak scholarly years, whether for articles (at the junior end) or monographs (at the senior end).

But surely a hiring frenzy is good? Not if supply does not respond. Entry-level professors are not quite fungible, and teaching interests are only mildly elastic. Consequently, the quality of, say, constitutional law novices available to a school, gauging quality by the conventional measures, will exceed the quality of those in commercial law, even assuming that supply is otherwise constant. And supply is not constant. An intellectually curious and able young commercial lawyer can earn fabulous sums in practice doing highly sophisticated work with very smart people, with leading firms clamoring for the tyro's services. The tangible rewards of the academy are significantly more modest, and the intellectual rewards, though very real, are not necessarily higher. In contrast, consider many public law fields, in which demand is often weak and pay generally modest. More of the talent entering public law fields will thus seek to decamp for the academy than will the similar talent in private law. Faculties often seek to hire the best available candidates, regardless of field; practically speaking, this now means that those faculties simply will not hire in commercial law, as all but the top schools will find the best available public law scholar more gaudily caparisoned.³⁴

Another cause is the relative obscurity of commercial law. Many public law fields have sprouted over the last several decades, each with its plethora of socially important problems and often haphazard legal solutions. Even within private law, some areas have grown greatly in prominence. Hard on the heels of commercial law came bankruptcy, with a major revision of the bankruptcy laws in the 1970s and subsequent revisions since, some quite recent and quite controversial. Corporate law has likewise become very active because of massive changes in the capital markets. Meanwhile, the earlier boom in commercial law writing had declined somewhat, properly leading the ambitious young scholar to think that other areas might prove more fruitful. Though the Code has had its share of revisions over the ensuing decades, including a near-total overhaul in the 1990s, none had the impact of the Code's initial enactment, and none had the effect of the revolutions elsewhere.³⁵

³⁴ What's more, as private lawyers occupy a smaller and smaller part of law faculty, they will have less and less ability to influence hiring. The self-replicating capacity of a law faculty knows few bounds. One may thus reach and pass a tipping point, after which a faculty lacks the private law depth to identify talented candidates, agitate for their hiring, and nurture them as budding scholars.

³⁵ To be sure, changes in the Code have typically yielded a boomlet of symposia. See, e.g., Symposium, *Symposium on Revised Article 1 and Proposed Revised Article 2 of the Uniform Commercial Code*, 54 SMU L. REV. 469 (2001); Symposium, *The Revision*

The rise of other fields also meant that hiring had to take them into account. Intellectual property, environmental law, alternative dispute resolution, employment discrimination, civil rights law, and so many others grew vastly in significance, and the academy scrambled to keep up; though some of these have since waned, and others have risen only modestly, taken as a whole they occupy a far greater portion of the academy than once they did. Faculties grew, as noted earlier, but a good deal of the growth had to go to these new or revitalized topics. Then, too, legal education changed, with more and more attention given the so-called skills courses—legal writing, clinics, and so forth. Here, too, faculties had to make room.

Another cause is perhaps more tendentious. Over the last decades, law schools, particularly the elite and the pretenders to that station, have cared less about curriculum and more about—well, other things—in their hiring. This is certainly not the place to explore how hiring has changed over time.³⁶ It may be sufficient to note that one element in that hiring is a reduced emphasis upon curriculum, especially at the top schools (remember, the trainers of much of the professoriate). Their faculties feel, with substantial accuracy, that their students can learn the legal doctrine required of them as issues arise in practice. From this they conclude that the faculty need not pursue research or teach in all practice areas, even all important practice areas; rather, the faculty should be hired to advance scholarship generally, without excessive regard to curriculum, and the curriculum can be filled in as needed with visitors and adjuncts.

This attitude may explain in part the lack of young commercial law scholars at most of the top schools. If few promising juniors have any interest in those areas, the top schools will, rather than dip lower in the pool, hire in other fields. Lower-ranking schools, more curricularly driven, will make more compromises with credentials; as we see, they offer more commercial law, taught more often by tenure-earning faculty. But schools ambitious to improve their lot may ape their presumed betters and look for faculty with

of Article 2 of the Uniform Commercial Code, 35 WM. & MARY L. REV. 1299 (1994); Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988); Symposium, *Symposium on the Revision of Article 9 of the Uniform Commercial Code*, 80 VA. L. REV. 1783 (1994). With a few exceptions, though, these symposia were in a sense scholarly dead ends; they contained much excellent work, but that excellent work tended not to inspire new writers or encourage new approaches.

Another possible explanation, at least of late, is the rise of empirical work. It is certainly possible to do empirical work in commercial law, particularly in the form of field studies. The massive databases of bankruptcy records or corporate filings, however, do not exist for commercial law. A budding empiricist might thus prefer the relative ease of working with extant databases to the drudgery of constructing her own.

³⁶ For one somewhat controversial exploration, see MARY ANN GLENDON, *A NATION UNDER LAWYERS* 199–229 (1994); *see also, e.g.*, Langbein, *supra* note 19, at 6–7.

plentiful citations and many placements in top journals. And, as we've seen, commercial law loses out here.

This takes us to the dearth of commercial law publications, particularly in top journals. As with hiring, the first explanation is demographic. Faculty tend to publish more articles when they are young and full of pep, and not yet encumbered (in the scholarly sense only) with family obligations, administration, and important but usually less prominent diversions like casebooks. As the commercial law population ages, it becomes less productive, quite independent of any questions of quality.

Seniority has an important secondary effect. Most of the now-fashionable approaches to legal studies were at most nascent in the 1960s, and very often arose later. Scholars who cut their academic teeth earlier may thus employ less recent techniques, which may to some degree bar them from the more theoretically-minded journals—that is, pretty much all the journals published by the more elite schools. Whether one terms this “obsolescence,” as does Professor Priest,³⁷ or merely a sort of academic dowdiness is perhaps a matter of style, but the effect seems present.

I have already suggested a recursive effect as another, rather insidious explanation. If students at the better schools less often study commercial law, then they will less likely recognize important issues. If it is taught more often by adjuncts, it will seem less important, and thus more readily ignored when winnowing articles. If it is taught uninspiringly, then it will seem an uninspiring (even if important) topic, and may make articles on the topic seem less appealing.

This last point needs a little explication, itself a little tendentious. I have not made anything approaching a survey of casebooks generally, so any comparative comments I make are at best glancing impressions. I have, however, reviewed commercial law casebooks with care, so I can say that, with a few noble exceptions, they seem calculated to induce a lack of engagement with the subject as a field fit for academic pursuit. Often the books are first-rate at developing familiarity with the Code, but there is much more to the study of a topic than that. Unlike, say, most contracts casebooks, commercial law books seldom delve into the bases for commercial law doctrine, whether the empirics of the marketplace or the theoretics of the academy. With no significant context, the subject will likely seem sterile, even if important—a sort of academic mule.³⁸ And few think the mule, rather than the thoroughbred, worth emulating.

³⁷ George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 *BUFF. L. REV.* 681, 683 (1988–1989).

³⁸ A point made with great, if unheeded vigor by Karl Llewellyn. K.N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 *COLUM. L. REV.* 651, 668–69 (1935).

And then there is the most tendentious, if simplest, explanation of all: Perhaps leading journals publish few commercial law articles because commercial law scholars aren't writing anything good. There is some truth in this. Demographics suggest that we as a group may lack our erstwhile productivity and may also tend not to use modish theoretical tools. If commercial law has grown unattractive to young and highly able scholarly Stakhanovites, then we should not be surprised if law reviews receive fewer articles written at the highest level.

Tucked within this comment—one I have heard from colleagues in (need it be said?) other fields, with greater or lesser degrees of facetiousness—is, however, an implicit assumption, which we should deal with briefly but firmly before moving to more important topics.³⁹ That assumption? That there is simply little of interest to be written about commercial law. Really? The Code itself has been revised entirely over the last decade or so. Commercial law encompasses many new types of transactions, each posing fresh practical and legal problems. And there is no approach to legal scholarship—none—that cannot be employed profitably in the study of commercial law. If some think the field settled, with nothing new to be said—well, there is a long history of savants pronouncing the closing of the scholarly frontier, and always have those savants looked silly.⁴⁰ Really, Samuel Johnson said it best; when asked why in his magisterial dictionary he had defined *pastern* as the knee of a horse, he replied: “Ignorance, Madam, pure ignorance.”⁴¹

III. SO WHAT?

By now you may well have been persuaded that commercial law in the academy is shrinking. This is true in general, but particularly in the elite law schools and the elite law journals. But so what? Roman law in the American

³⁹ Cf. THE ALGONQUIN WITS 116 (Robert E. Drennan ed., 1968) (from a book review by Dorothy Parker: “This is not a novel to be tossed aside lightly. It should be thrown with great force.”).

⁴⁰ For example, Max Planck was warned away from physics in the 1870s; he was told that only details remained. WILLIAM H. CROPPER, GREAT PHYSICISTS 231 (2001). Albert Michelson, the first American Nobel Prize winner in Physics, announced of physics in 1894 that “it seems probable that most of the grand underlying principles have been firmly established” Lawrence Badash, *The Completeness of Nineteenth-Century Science*, 63 ISIS 48, 52 n.20 (1972) (quoting A.A. Michelson, *Some of the Objects and Methods of Physical Science*, 3 UNIV. CHI. Q. CALENDAR 15 (1894)). Oops. And he really should have known better; his Nobel Prize was for work that led directly to relativity theory. For other mistaken prognostications, see Badash, *id.*

⁴¹ JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 211 (R.W. Chapman ed., Oxford University Press 1953) (1799).

academy is in much the state of the Roman Empire in 476 C.E., and we seem to stagger on without intimate knowledge of the *actio contraria*. We have, and will continue to have, an active commercial bar. Can it not be trusted with commercial law?

You may guess how this author answers that question. To explain the obvious answer will take a few moments.

The issue is not whether commercial law will go the way of Roman law. As long as we have commerce, we will have commercial law; as long as we have commercial law—particularly as long as it remains a Bar topic—it will be offered regularly at most American law schools. Rather, the question is whether it will remain a topic for inquiry at the best law schools, which traditionally have provided most American law teachers and most intellectual leaders of our profession. Here we risk a vicious cycle. If students at these top schools do not have the chance to take commercial law; if it is taught mainly by adjuncts or by lesser figures; if they do not see articles in the field published in the leading journals—then they will draw the sensible conclusion that the field isn't as important as others where these are not true, and transfer their attentions elsewhere. Without a fresh supply of academics, trained at the best schools and skilled in the newest analytical methods, commercial law in the academy is in danger of becoming an intellectual backwater.

Now, perhaps, the harm is manifest. I do not worry whether the flow of narrow doctrinal articles will dry up (though there are few enough even of those). I worry whether the flow of sophisticated analytical articles will dry up. Even more, I worry whether the flow of people who do sophisticated analysis will dry up. Commercial law, to paraphrase Clemenceau, is too important to be left in the hands of commercial lawyers. From the early days of the academy, commercial law in this country has been led in large part by academics—Samuel Williston, Karl Llewellyn, Grant Gilmore, and others. Treatise-writers, such as Professors White and Summers in our day, have done much to mold the law. Reporters of drafting committees, and frequently the members as well, have come from the professoriate, traditionally the elite professoriate.

This is less and less true. Treatises have fallen out of fashion.⁴² And, as John Langbein has lamented, “[l]aw reform work in the service of the

⁴² See, e.g., Langbein, *supra* note 19, at 5; Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 463 (2000) (“[A]t many of the ‘elite’ law schools the treatise or casebook is no longer the prestige vehicle for legal scholarship . . .”); George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437 (1983) (“Today, authorship of the legal treatise has been cast off to practitioners. The treatise is no longer even a credit to those competing on the leading edge of legal thought.”).

organized bar has faded from the elite law schools.”⁴³ As we have seen, commercial law, to take but one example, is very much below the salt at the top schools.

This is deplorable. Law schools owe something to the legal profession and to the world at large. We have not hesitated to help clients through our clinics. We have always given our counsel to governments and to non-governmental organizations at home and abroad. We have taken active roles in law reform—though not so often now, at least at the top.⁴⁴ Why should the finest law schools think it appropriate to abdicate this responsibility in commercial law? As Peter Birks has said, “[t]here is . . . a necessary partnership between the judges and the law schools and between legislators and the law schools.”⁴⁵ Paid advocates are generally skilled and able, but they represent their clients, and those interests align with the public’s only coincidentally. Put more firmly, again by Professor Birks:

[T]he law schools are discharging a public and constitutional function essential to a modern democracy. It is a law-making function, continually directed to the improvement of the law and to the underpinning of its authority or, perhaps the more suitable word in a modern society, its legitimacy. The law schools are the guardians of the law in the interest of the public.⁴⁶

Paul Carrington, a moderate skeptic of the importance of legal academics as shapers of the law, has put it similarly: “a university law school has an exceptional opportunity to bridge the worlds of ideas and affairs, supporting traffic in both directions to bring academic thought into contact with reality and practical governance into contact with disinterested inquiry, with benefits flowing in both directions.”⁴⁷ For the finest schools to say that they will not hire in commercial law because there is no one good enough, and then not to produce people good enough because they offer no classes, is—well, convenient, perhaps, but also irresponsible and unworthy.

⁴³ Langbein, *supra* note 19, at 6.

⁴⁴ *Id.*

⁴⁵ Peter Birks, *Editor’s Preface*, in *WHAT ARE LAW SCHOOLS FOR?*, *supra* note 19, at v, vii.

⁴⁶ *Id.* at viii.

⁴⁷ Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 792 (1992); see also, e.g., Donald B. Ayer, *Stewardship*, 91 MICH. L. REV. 2150, 2161 (1993) (“[A] duty of stewardship for the law should be at the heart of [the legal academy’s] work.”).

IV. FROM CAUSE TO CURE

We have a malady, and we even have some sense of its pathophysiology. But diagnosis is easier than cure. There are so many causes of the current crisis that no one solution can work, and even a battery of solutions probably will not work entirely. Still, it would be an accomplishment to stanch the bleeding and perhaps give the occasional iron pill to our anemic field. With that in mind, here are a few thoughts about how we might ensure a vital commercial law professoriate.

– Mobilize the students. At most schools, a large percentage of the students wish to enter business law, whether as litigators or as dealmakers. They would like to see a range of courses that equips them for their intended field. A school that cannot offer even the basic courses regularly is not likely to leave them satisfied, particularly if the school's curriculum is strong in other areas less central to the interests of the students. (This is not to say that these other courses lack value, but rather that a degree of balance is in order.) If the students tell the dean that they would like to see more business classes—from my vantage, particularly commercial law classes, whether basic or advanced—then the school may try to hire faculty to teach them. To be sure, there are many areas for slippage here. The dean may think otherwise; the faculty may think otherwise; the faculty may be willing to hire in commercial law, but only if a candidate is at least as impressive superficially as the leading constitutional law candidate . . . Alternatively, the result may be an influx of adjunct-taught courses—all very well in their way, but not on the whole a substitute for hiring tenure-track faculty. Still, to the extent faculties take curricular need into account when crafting their hiring missions, concerted efforts by students to promote hiring in commercial law should have a salutary effect.

– Mobilize the alumni. A plurality of the graduates of most law schools, perhaps even a majority, engage in commercial litigation or transactional work. Much of this work involves commercial law. These alumni generally figure prominently among the leading supporters of a law school, whether financial or otherwise. They would be dismayed to learn that a subject at the core of their professional lives has been allowed to wither. (This intimation of dismay is not entirely hypothetical, by the way; practitioners with whom I've discussed my thesis have uniformly been appalled.) If they make their dismay known to the dean, then perhaps the dean, and the faculty as well, might respond. We all wish for contented, helpful, and generous alumni, and the possibility of disgruntlement and disaffection may well provide the impetus for action—as indeed it has at one school I know.

This suggestion is not lightly made. One hesitates to encourage non-academics to involve themselves too deeply in the governance of an academic body. But desperate times call for desperate measures; if we cannot

persuade our colleagues to act through conventional appeals to reason, perhaps appeals to naked self-interest will work.

– Encourage the top schools to teach commercial law more often, and with tenure-earning faculty. This is in some ways a radical proposal, given the modest curricular attention paid at many of these schools and the substantial independence of their faculties. Still, many of the top schools have excellent commercial law scholars who, for whatever reason, do not always teach commercial law. In 2005–06, for example, Elizabeth Warren (Harvard), Alan Schwartz (Yale), Robert Scott (Virginia), Robert Hillman (Cornell), Lisa Bernstein (Chicago), Douglas Baird (Chicago), and Jody Kraus (Virginia), to name those who come to mind first, did not teach commercial law. All of them have done work at the highest level in the field, and all would be superb guiders of potential academics. Not to have them in the classroom is a great loss. Very likely some taught classes that they prefer, or perhaps classes that were considered more in need by their academic deans. Forced labor is anathema generally, and to academics particularly. But one would hope that these and others—including those who taught this year, but who might not next—would choose to teach commercial law more often, as a service to the academy and to the profession.

– Encourage the theoretically-minded to pick up commercial law as the law part of “law and.” There is much grist for many mills in commercial law. Law and economics? Of course, and there have been many legal economists who have seen this. Law and philosophy? Certainly, and for many years. Where, after all, did Legal Realism come from? More recently, a number of fine legal philosophers have looked at commercial law with great profit. Legal history? Less well studied, but still with its adherents. Law and psychology? Again, not many scholars in behavioral aspects of commercial activity, but some.

One might think that a rational and ambitious scholar trained in another discipline would look at commercial law as almost too easy. In constitutional law—well, it gets harder and harder to be both original and rational. Even in the business world, there is no utterance of the Delaware Chancery Court that is not instantly pawed over by economics-minded law professors. Why not take up a field that is largely untenanted? Perhaps the lack of competition is part of the problem. Fewer participants means less engagement, fewer exchanges, fewer citations, greater obscurity. And then the more technical aspects of commercial law can be difficult to master, at least with the degree of situation-sense, to use Llewellyn’s phrase, that leads to interesting and productive analysis. Still, with a fairly modest investment, given the length of one’s career, one can get a most impressive return. If only the law-and leaders at the top schools would make these suggestions to their impressionable charges, we might see more of those scholars enter commercial law, with a salutary effect on the literature.

– Don't curtail demand by curtailing classes. The next generation of scholars will be far less likely to take up commercial law in the academy if it has not had the opportunity to take it in law school. We have already seen that the top schools have done precisely this. Another tendency is to offer survey courses instead of the three free-standing courses. As an adjunct to the usual classes, this is unobjectionable; some students wish only a broad overview of commercial law, perhaps for the Bar examination, and one might as well serve them.⁴⁸ As a replacement for them, it is quite another thing. Much the same may be said of offering the courses in alternate years. To a great extent, demand follows supply. The less frequently a law school offers a course, the less important it will seem. Fewer students will be around who can give the course any hallway buzz. The resulting modest enrollments will apparently justify infrequent offerings, when in fact more frequent offerings would yield higher enrollments.⁴⁹

– Encourage the top schools to look more aggressively in commercial law. This too is radical, though it would not have seemed so a couple of generations ago. Faculty at the leading schools more commonly will say that *of course* they would like to hire in commercial law, but there simply hasn't been anyone suitable of late. In many cases that is sincere. The very few commercial candidates with credentials commonly sought by the loftiest schools do very well indeed, even somewhat better than their credentials would suggest. But in a market as pinched as ours, there won't be enough of these candidates to satisfy the needs of those schools, and so, with varying levels of regret, the slots will go elsewhere. Hence the modest commercial offerings at the top schools and the regrettably high use of adjuncts.

With no obviously attractive candidates, though, what are the schools to do? One possibility is to look more carefully outside the ranks of the traditional feeder schools. Gauging from a look at the leaders in academic commercial law, this might prove fruitful. Many, perhaps most, did go to

⁴⁸ Though a course that becomes a forced march through Code sections is likely to be less than inspiring, and a student who takes an uninspiring course may be less inclined to think the subject worth serious pursuit later.

⁴⁹ A related point: The tendency to abridge Contracts has had a modest but baneful effect on commercial law. Once a six-credit mainstay, it is now offered as five or four—or even, one hears rumors, three. Commercial law teachers often, perhaps usually, teach Contracts as well. One would therefore think abridgment a good thing, in that it would free up commercial law teachers to teach more commercial law. Yes, but it also means that, if they teach more commercial law, there is less need to hire more commercial law teachers. Also, as Contracts shrinks, it is more likely to be taught by people who are not contracts scholars, but who do it as a service. (Service to whom, one wonders, if they aren't particularly expert in the literature or the caselaw.) Finally, as the Contracts course shrinks, it is less likely to cover much sales law, making commercial law seem all the more to be a minor offshoot of the common law of contract. See, e.g., Macintosh, *supra* note 4, at 674–75.

traditional feeder schools. But... Elizabeth Warren, whom any law faculty in the country would be proud to hire, is a Rutgers-Newark alumna. Richard Speidel, one of the great figures in sales law, graduated from Cincinnati. Ronald Mann, perhaps the finest of the younger generation of commercial law scholars, went to Texas. Robert Scott, very possibly the leading economic analyst of contracts and commercial law, took his J.D. at William & Mary. William Henning, executive director of NCCUSL, chair of the amended Article 2 drafting committee, and author of a leading treatise on sales, went to Tennessee. Some others, in no particular order—all important figures in modern commercial law: Robert Hillman (Cornell), Linda Rusch (Iowa), Marion Benfield (Wake Forest), Amelia Boss (Rutgers-Camden), Douglas Whaley (Texas), Peter Alces (Illinois), John Murray (Catholic), John Dolan (Illinois), William Woodward (Rutgers-Camden), Jean Braucher (Boston University), Henry Gabriel (Gonzaga), Raymond Nimmer (Valparaiso), and so forth. One could likely come up with a list like this in other fields; indeed, it would be an interesting exercise to put together an all-star law faculty consisting entirely of people who did not attend academic feeder schools. But this list seems unusually long and deep.⁵⁰ Why? It's hard to imagine that budding commercial law scholars naturally gravitate to schools that do not traditionally produce large numbers of academics. Perhaps the talent has always been at the schools a little outside the top bin, but law schools, conservative in hiring as they are in little else, have declined to look there—but have had to in commercial law.⁵¹ Whatever the reason, there is at least some informal evidence that one might profitably look beyond the traditional handful of feeder schools, at least when searching for future stars in commercial law.

– Encourage the better journals to pay less attention to the citation counts of authors, at least across fields. It has become common nowadays for law journals to investigate the bona fides of the authors who submit manuscripts to them, in an effort to separate the royalty from the rabble. Of late, this has taken the form of checking the number of citations to each author's work and the placements of the author's articles. This is not entirely a bad idea. Within a field, given two scholars of equal seniority, very likely the more-cited-to scholar is the better scholar. Though there are many reasons for citations, not all of them reflecting quality, most citations indicate *some* level of approval

⁵⁰ To be sure, several of these eminent scholars took graduate degrees in law from traditional feeder schools.

⁵¹ A most interesting recent study of the highest-flying of high-flying young academics found that the only statistically significant predictors of future stardom were whether they had published their student notes and how many articles they had published before appointment—not pedigree, not clerkship, not prior teaching, not law review. Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1544 (2004) (book review).

or *some* degree of significance. As law review editors do not generally count among their merits a keen appreciation of the major figures in the myriad fields in which they review articles, citation counts provide useful information. Similarly, even though whether a particular journal accepts an article has a very modest relation to that article's quality, taking the market as a whole and looking over a scholar's career, there is some relation between placements and quality.

But this is true only to a point. If editors wish to compare within a field (controlling, of course, for seniority; a hot junior scholar likely will have fewer citations than a run-of-the-mill senior scholar), citation count is a decent proxy for quality. Across fields, though, this is not so. Some fields generate more citations because there are more people working in them, not because the fields are intrinsically more important. More articles means more citations. Commercial law is a fine illustration. Professors Eisenberg and Wells have shown that commercial law professors have significantly lower citation rates than other fields.⁵² More bluntly, Fred Shapiro, in a study of the most-cited law professors, wrote that "scholars of business law topics . . . have little chance of appearing on my lists."⁵³ Journal editors assessing quality need to take this effect into account.

The same goes for placements. There is considerable danger of path-dependence if editors are too tied to what their predecessors have done. This works to the detriment of the junior and to those whose initial work was relatively unambitious. It also hurts those who work in unfashionable fields—and, as we have already seen, commercial law is one of these. To some extent its inferior placements are, if we are to be candid, merited, but only to some extent, and law reviews must be prepared to put placements, like citations, in context.

One further use of citations in particular needs comment. Recently it has been easy to gauge how frequently a journal's articles are cited to, whether in aggregate or by looking at their impact.⁵⁴ Anecdotal evidence suggests that some journals seek to improve their ranking in citation studies by publishing articles they think likely to yield a great many citations—articles on newsworthy topics, importantly, but also articles using voguish methods or written by prominent authors. One wonders how much of a difference this will make; though many authors look closely at citation studies when sending out manuscripts or weighing offers, they look as well to the overall reputation of the school—perhaps more so, I imagine. In any case, this chase after the marginal spot in rankings has a cost. Is the ninetieth article on some

⁵² Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 409 (1998).

⁵³ Shapiro, *supra* note 12, at 413.

⁵⁴ See *supra* note 13.

newsworthy topic really going to make much of a difference to the law or the legal debate, even if it gets cited by the ninety-first, ninety-second, *und so weiter*? And what does this mean for articles in topics of great importance to bench and bar, but that are out of fashion in the academy, and thus likely to garner few citations? Law journals are not ends in themselves. They are parts of law schools with broader missions and responsibilities. As their editors properly try to ensure that they get the best possible articles between their covers, they should remember that quality does not automatically rest in citation indices.

– Encourage faculties generally to review the publication records of job candidates in their doctrinal context. To some extent this merely repeats the suggestions to law reviews, and with more force; law students at least have the excuse of naïveté when they look too closely at citations and placements. Again, these provide useful information, particularly when looking within a field. But one of the causes of our present crisis is an unwillingness to look at a field in the context of that field—to compare commercial law candidates, whether entry-level or lateral, with, say, constitutional law candidates, almost invariably to the detriment of the former.

To be sure, we are to some degree judged, or at least rated, by our citations and our placements. We do need to take these ratings somewhat seriously, insofar as they affect the quality of our students and our colleagues-to-be. But one can take a bad thing too far, when tenure, promotion, hiring, and the like are unduly ruled by inappropriate comparisons across fields, all in the quest for an extra place or two on this ranking or that.

As Professor Turnier tartly put it, “any school intent upon high ranking would be well advised to abolish all commercial offerings and concentrate on constitutional, criminal law, and human rights issues.”⁵⁵ What a pity that so many schools seem to have taken his Swiftian comment seriously.

V. CONCLUSION

This Essay has been fairly light-hearted,⁵⁶ in keeping with the tenor of this symposium. I hope the reader does not take from this tone the conclusion that I harbor a similarly blithe attitude on the future of academic commercial law. Nothing could be further from the truth. In fact, as I have worked on this Essay, my mood has ranged from irritation to despair. Nothing I have seen or done in the academy has left me so depressed, so angry, so hopeless. But why? After all, no one proposes that any of us may not teach commercial law or write in commercial law or engage in commercial law reform. As our

⁵⁵ Turnier, *supra* note 24, at 196.

⁵⁶ If at times heavy-handed.

numbers shrink, indeed, our opportunities increase. For selfish reasons alone, this prospect should be Elysian.

Yet this prospect is less Elysian than infernal. Partly it is simple loneliness. Constitutional law scholars can count on a lively exchange in their school's corridors. So too can those in many other fields. Young commercial law scholars cannot count on having anyone in the building who speaks their language—no one to read drafts or exchange ideas or work through stubborn problems, save from the vantage of an intelligent but uninformed generalist. It is hard to develop as a scholar without senior guidance.⁵⁷ True, there are senior faculty at other schools who would be happy to help, but the junior scholar may be loath to approach them, and in any case there is no real substitute for having someone down the hall.

Even for those of us who have been around a bit and who can readily pick up the phone to call the eminences of our field (or who may be eminences ourselves), the silence grows oppressive. It is commonplace to note that articles in commercial law are not cited as much as articles in, say, constitutional law. This reflects the number of scholars who can provide the citations. In more human terms, this means that the author of a commercial law article cannot count on any sort of scholarly dialogue. The next article on the topic may be a decade or more away. Far from a robust exchange, this makes publishing something like playing postal chess with someone who opens her mail once a month.

And then there is the effect on our teaching. Our students are no fools. They realize that commercial law is important, and generally take the classes when our schools can be bothered to offer them. If our schools respond to demand without hiring, then the few of us left in commercial law must teach the core classes more often, losing the chance to teach advanced courses or related courses that would interest us.⁵⁸ Or they will push us into survey courses that purport to cover the whole Code in some modest number of credits, and that in truth let us race through the main concepts at high speed without the time to explore context or reason. Or, of course, our schools could let us teach what we like, filling in (or not) with adjuncts—perhaps a service to us, but not to our students.

Finally, there is the state of the law. With less leadership from the academy, what will happen to commercial law? I do not suggest that commercial lawyers or judges hang on our every word. What we say does

⁵⁷ An observation made with force in many fields. See, e.g., ISTVÁN HARGITAI, *THE ROAD TO STOCKHOLM* 129 (2002) (discussing the importance of venue in the careers of future Nobel Prize winners: "A decisive influence for a research career is for it to be launched in a strong environment.").

⁵⁸ This complaint is hardly original. James White registered it more than a decade ago, and at a school stronger than most in commercial law. James J. White, *Letter to Judge Harry Edwards*, 91 MICH. L. REV. 2177, 2182 (1993).

make a difference, though: even if our articles are seldom cited to, they may still be read; even if they are not read by judges and lawyers, they influence treatises, which *are* read and used, and casebooks, which affect how those in the field approach legal problems. And in commercial law, reform by statute has always had a hefty academic contribution, from the days of Samuel Williston forward. For the academy to leave commercial law untenanted is to abdicate its responsibility in a vital field. This irresponsibility is variously depressing and enraging to one who takes law seriously, as I hope we all do.⁵⁹

One hates to end this symposium on so glum a note. Surely there is hope? Even Pandora's box, emptied of the massed evils of the world, left that. And of course there is hope. There always is, even if weary experience counsels otherwise. Perhaps the better law schools will belatedly resume their responsibilities to the academy and the legal world.⁶⁰ Perhaps ambitious fledglings, aware if nothing else of the many jobs open in commercial law, will once again flock to it, enlivening scholarship and attracting still more to the freshly vital field. Perhaps the law reviews will respond to plentiful and exciting scholarship by giving it prominent voice. Other fields, once backwaters, have thus risen.

I confess that resignation, more than hope, figures in my reflections. Great change would require that some faculty at some schools act inconveniently and even unselfishly, and even one disinclined toward cynicism may doubt the likelihood of that. But a call to the as yet unvested may work. Certainly the rare candidate in commercial law who does show impressive and even partly realized theoretical ambitions is eagerly pursued by throngs of suppliant law schools. Should anecdotes of these successes spread, perhaps the undifferentiated proto-academic might be induced to pursue commercial law. Once a lively junior professoriate reappears, then many of the problems we now see will abate, and academic commercial law will resume its past vitality. Meanwhile, we shall hope the field remains sufficiently vital—in part through symposia like this?—to warrant the attention of the young and ambitious, and to lead and guide the commercial bench and bar.

⁵⁹ It is only right to add that commercial law is not the only field in which the (few remaining) practitioners could make these claims. One that springs to mind is trusts and estates. When next there is a T&E counterpart to this symposium—Trusts Tragedies? Devising Disasters?—an even more pathetic tale may well be told.

⁶⁰ Indeed, some recent hiring suggests a modestly renewed regard for commercial law; in the last couple of years, I know of three entry-level commercial law faculty hired by leading schools. This hardly makes up for a decade or more of neglect, but with luck it heralds a welcome renaissance.

